

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

ANGELA W. JEFFERSON,	:	
Plaintiff,	:	
	:	
v.	:	CA 09-537 ML
	:	
ROBERT M. GATES,	:	
SECRETARY OF DEFENSE,	:	
Defendant.	:	

**REPORT AND RECOMMENDATION**

David L. Martin, United States Magistrate Judge

Before the Court is Defendant's Motion to Dismiss (Document ("Doc.") #22) ("Motion to Dismiss" or "Motion"). Plaintiff Angela W. Jefferson ("Plaintiff") has filed a response to the Motion. See Plaintiff['s] Response to Defendant['s] Motion to Dismiss (Doc. #25) ("Plaintiff's Response").

The Motion to Dismiss has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B). The Court has determined that no hearing is necessary. After reviewing the filings and performing independent research, I recommend that the Motion be granted for the reasons stated below.

**I. Facts<sup>1</sup> & Travel**

Beginning on or about October of 2002, Plaintiff, an African-American female, was employed at the Defense Institute of

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<sup>1</sup> The facts stated in Plaintiff's Complaint (Doc. #1) are assumed to be true for purposes of this Report and Recommendation.

International Legal Studies ("DIILS"). See Complaint (Doc. #1) ¶ 2. Plaintiff worked at DIILS for five years. See id. She was the only black employee at DIILS. See id. ¶ 5.

In approximately May of 2007, the Department of Defense initiated an investigation into allegedly unlawful and discriminatory conduct and employment practices, particularly at DIILS. Id. ¶ 3. This investigation was a direct consequence of allegations raised by Plaintiff that she had been subjected to discrimination based on her race (African-American) and color (black), as well as reprisal (prior Equal Employment Opportunity Commission ("EEOC" or the "Commission") complaint), harassment (nonsexual), verbal abuse, different pay, and different policy standards. See id.

Plaintiff filed a Complaint of Discrimination in the Federal Government with DIILS ("DIILS Complaint") on October 22, 2007. See Defendant's Memorandum of Law in Support of His Motion to Dismiss ("Defendant's Mem."), Attachment ("Att.") 1 (Declaration of Mary Braisted ("Braisted Decl.")), Exhibit ("Ex.") B (DIILS Complaint).<sup>2</sup> In the DIILS Complaint Plaintiff indicated that she

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<sup>2</sup> Ordinarily a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment. Alternative Energy, Inc. v. St. Paul Fire & Marine Insurance Co., 267 F.3d 30, 33 (1<sup>st</sup> Cir. 2001). However, there is a narrow exception "for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." Id. (quoting Watterson v. Page, 987 F.2d 1, 3 (1<sup>st</sup> Cir. 1993)); see also Barber v. Verizon New England, Inc., No. C.A. 05-390ML, 2005 WL

had been discriminated against on the basis of her race and color. See Braisted Decl., Ex. B. Plaintiff stated that she believed the Finance and Administrative Department and its director, Margaret "Jane" Donahue, discriminated against her; that the most recent dates on which the alleged discrimination

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3479834, at \*1 n.1 (D.R.I. Dec. 20, 2005) ("While a court deciding a Rule 12(b)(6) motion is normally constrained to consider only the plaintiff's complaint, a court may nonetheless take into account a document whose contents are linked to the complaint and whose authenticity is not challenged, such as a charge of discrimination filed with the Commission, without converting the motion into a summary judgment request.") (citing Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 17 (1<sup>st</sup> Cir. 1998)); Robinson v. Chao, 403 F.Supp.2d 24, 28-31 (D.D.C. 2005) (considering EEO documents and dismissing hostile work environment claim which plaintiff failed to administratively exhaust); Maldonado-Cordero v. AT&T, 73 F.Supp.2d 177, 185 (D.P.R. 1999) ("Plaintiffs' EEOC charges may be considered either as a matter referenced in the complaint or as a public record subject to judicial notice.") (citing Mack v. S. Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9<sup>th</sup> Cir. 1986) (holding that court may take judicial notice of records and reports of administrative bodies without converting a motion to dismiss into one for summary judgment), overruled on other grounds by Astoria Fed. Savings & Loan Association v. Solimino, 501 U.S. 104, 111 S.Ct. 2166 (1991)); Arizmendi v. Lawson, 914 F.Supp. 1157, 1160-61 (E.D. Pa. 1996) ("In resolving a Rule 12(b)(6) motion to dismiss, a court may properly look beyond the complaint to matters of public record including court files, records and letters of official actions or decisions of government agencies and administrative bodies, documents referenced and incorporated in the complaint and documents referenced in the complaint or essential to a plaintiff's claim which are attached to a defendant's motion.").

Here the documents at issue are official records and/or documents central to Plaintiff's claims. See Defendant's Memorandum of Law in Support of His Motion to Dismiss ("Defendant's Mem."), Attachment ("Att.") 1 (Declaration of Mary Braisted ("Braisted Decl.")), Exhibits ("Exs.") A-D; Plaintiff[s] Response to Defendant[s] Motion to Dismiss ("Plaintiff's Response"), Ex. 1. Accordingly, the Court finds that the documents may be considered without converting the Motion into one for summary judgment. See Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d at 33-34; see also Romano v. NFN Tolson, Civil Action No. 06-573-JJF, 2007 WL 1830896, at \*2 (D. Del. June 25, 2007) ("[A]uthentic records documents relating to the issue of exhaustion<sub>1</sub> may be considered by this Court without converting the motion to a motion for summary judgment.").

occurred were May 6, June 16, September 18-19, September 24, and October 2, 2007; and that she had discussed her DIILS Complaint with EEO counselor Kelly Soo Hoo. See id.

The procedural history following the filing of Plaintiff's DIILS Complaint is summarized in the Show Cause Order issued by the EEOC on February 17, 2009:

1. Complainant filed a formal Complaint of discrimination on October 22, 2007. An Agency<sup>[3]</sup> investigation was requested on December 20, 2007<sub>[,]</sub> and was commenced on January 9, 2008.

2. Complainant resigned from her position with the Agency on December 27, 2007.

3. By letter dated January 29, 2008<sub>[,]</sub> Complainant informed the Agency she intended to pursue her complaint.

4. An Acknowledgment Order was issued to the parties by the Hearings Unit of the Equal Employment Opportunity Commission on November 10, 2008. The Agency contends Complainant has not issued any action based on the Acknowledgment and Order.

5. The Agency attempted to contact Complainant by certified mail and telephone at ... Complainant's last known number<sub>[]</sub> to pursue discovery and settlement pursuant to the Acknowledgment and Order with no success. The telephone number was no longer in service and the certified mail was not picked up or signed for. The Agency moved for dismissal based on Complainant's failure to prosecute her case.

On January 2, 2009<sub>[,]</sub> the Administrative Judge issued a scheduling order in this case. The order instructed the parties that a prehearing conference was scheduled for February 6, 2009<sub>[,]</sub> via telephone and the witness lists were due no later than 5 days prior to the prehearing conference. Complainant failed to submit a

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<sup>3</sup> The "Agency" is presumably the Defense Institute of International Legal Studies ("DIILS").

witness list and failed to contact the undersigned [Administrative Judge] to request an extension or offer an explanation for her actions.

On February 6, 2009<sup>[,]</sup> at 1:30 PM the Administrative Judge telephoned the Agency representative who indicated he still had not heard from Complainant. The Administrative Judge then attempted to telephone Complainant at her last known telephone number and found it was not in service.

Complainant telephoned the Administrative [Judge] at approximately 2:50 PM and asked if we were having the teleconference. She offered no explanation for failing to notify the Agency or the Commission that her record telephone number was no longer in service. Nor did she explain why she has not contacted the Agency with respect to settlement as provided at Paragraph IV of the Acknowledgment Order or why she did not submit a witness list pursuant to the instructions in the scheduling order. Moreover, she denied that she was aware of any correspondence from the Agency, stating only that she would talk to someone at the post office as her mail was often misdelivered.

Braisted Decl., Ex. C (Show Cause Order) at 1-2. The Administrative Judge "ORDERED [Plaintiff] to show cause, within 15 days of the date of [the Show Cause] Order, as to why sanctions pursuant to 29 C.F.R. § 1614.109(f) (3),<sup>[4]</sup> up to and

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<sup>4</sup> Section 1614.109(f) (3) provides in relevant part that:

When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to an order of an administrative judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge shall, in appropriate circumstances:

....

(iv) Issue a decision fully or partially in favor of the opposing party; or

....

including dismissal of the captioned complaint[,], should not be imposed for the above-described conduct." Id. at 2. Plaintiff responded to the Show Cause Order by requesting a continuance of fifteen days. See Braisted Decl., Ex. D (Respon[se] to Order of Show Cause) at 1. Plaintiff stated:

1. A formal complaint of discrimination was filed on 22 October 2007. An agency investigation was requested on 20 December 2007 and was commenced on 9 January 2008. However, the investigating official did not interview the complainant['s] witnesses.

2. Complainant did resign from her position on 27 December 2007.

3. Complainant did submit a letter on 29 January 2008 to continue the discriminat[ion] case of Angela W. Jefferson v. Robert M. Gates, Secretary of Defense, Agency Docket No. DON 08-DIILS-001. Complainant submitted both home and cell phone number[s] with email address. Complainant['s] home phone was removed due to harassing phone calls from an untraceable phone number. Complainant did not receive[] contact via the alternate phone number or email listed.

4. Complainant did not receive certified mail.

5. Complainant did not submit a list of witness[es] due to [the] fact [that] the witnesses were on the original investigation list and were not interview[ed] but witness[es] had agreed to provide written statements. Statements will be provided upon request or member will be provided if further information is needed.

6. An assessment of the complainant['s] damages w[as] not yet completed and thus the complainant was unable to provide [a] settlement request.

7. Complainant was emotionally distraught and traumatized by the events that le[d] to the EEOC complaint and was

under professional psychiatric care.

8. As [of] 3 March 2009 the complainant ha[s] receive[d] the medical care needed and will continue to receive medical care as needed. Complainant is now able to help and proceed without delay in her case. Due to confidentiality medical documents will be made available as requested.

Id. at 1-2.

In a Dismissal Order dated March 13, 2009, the EEOC dismissed Plaintiff's DIILS Complaint. See Braisted Decl., Ex. A (Dismissal Order) at 4. After reciting the procedural history summarized in the Show Cause order, the issuance of the Show Cause Order, and Plaintiff's response thereto, the Administrative Judge continued:

It is significant that at no time prior to the issuance of the Show Cause Order did Complainant request any extension of time to respond to orders or comply with time deadlines. Nor did she notify either the Administrative Judge or the Agency that her telephone had been disconnected and ask that she be contacted via e-mail or cell phone. Moreover, Complainant provided no explanation as to why the certified mailings from the Agency went unclaimed when she received ...<sup>[5]</sup> the Acknowledgment and Order and the Order Scheduling Hearing that were sent to the same address.

In her response to the Show Cause Order Complainant further argued that she should have been contacted by e-mail or cell phone because she gave that information to the Agency in a letter dated January 29[, ] 2008[, ] indicating she wished to continue her discrimination case. She did not provide a copy of the letter nor does she claim that she indicated in the letter that her home

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<sup>5</sup> In the original the sentence continues at this point with the wording "delivered to the same address w[h]ere she received the Acknowledgment and Order and the Order Scheduling Hearing that were sent to the same address." Braisted Decl., Ex. A at 4. For clarity, the Court has deleted the eight words following the word received.

telephone number was disconnected.

Complainant has shown no good cause for failing to follow the orders of the Commission nor did she at any time from the issuance of the November 2008 Acknowledgment and Order forward a request [for] an extension o[f] time or stay of proceedings due to any medical condition.

For the reasons set forth above, the sanction of dismissal of this complaint pursuant to 29 C.F.R. § 1614.109(f)(3) is appropriate. Accordingly, the subject Complaint is DISMISSED before the Commission. This matter is referred to the Agency for issuance of a final agency decision.

Id.

The Department of Defense, Washington Headquarters Services, issued a Final Order with regard to the discrimination complaint of Angela Jefferson v. Robert M. Gates, Secretary of Defense, Agency Docket No. 2008-DSCA-058, EEOC No. 570-2009-00063X, on April 6, 2009. See Plaintiff's Response, Ex. 1 at 1. The Final Order stated that: "this final action notifies you that the Agency will fully implement the [Administrative Judge's] decision. The term 'fully implement' means the Agency adopts without modification the Judge's decision." Id. The Final Order further informed Plaintiff that:

If you are dissatisfied with the Agency's final action you have the following rights:

a. You have the right to file an appeal of the Agency's final action to the EEOC Office of Federal Operations (OFO) at any time up to 30 calendar days after receipt of this decision. ...

....

e. If you elect not to file an appeal to the EEOC, OFO under Title VII of the Civil Rights Act, as amended,

and/or the [ADEA], as amended, you may file a civil action in the U.S. District Court for the Eastern District of Virginia:

(1) within 90 calendar days of receipt of the Agency's final action, if no appeal to the EEOC has been filed;

(2) within 90 days after receipt of the EEOC final decision on appeal; or

(3) after 180 days from the date of filing an appeal with the EEOC if there has been no final decision by the EEOC.

Filing a civil action will result in termination of the administrative processing of the complaint.

....

Id. at 1-2.

Plaintiff filed the instant Complaint on June 3, 2009, in the United States District Court for the Eastern District of Virginia. See Docket; see also Complaint. On motion of Defendant Robert M. Gates ("Defendant"), see Defendant's Motion to Defer a Response to the Complaint and to Transfer Venue (Doc. #10), the case was transferred to this Court on November 6, 2009, see Docket. On February 2, 2010, Defendant filed the Motion to Dismiss. See id. Plaintiff filed her Response to the Motion on March 3, 2010. See id. The matter was subsequently referred to this Magistrate Judge, see id., and was thereafter taken under advisement.

## **II. Law**

### **A. Pro Se Status**

Plaintiff is proceeding pro se, and her Complaint is held to a less stringent standard than one drafted by a lawyer. See Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 596 (1972). It is to be “read ... with an extra degree of solicitude.” Rodi v. Ventetuolo, 941 F.2d 22, 23 (1<sup>st</sup> Cir. 1991). The Court is required to liberally construe a pro se complaint. See Strahan v. Coxe, 127 F.3d 155, 158 n.1 (1<sup>st</sup> Cir. 1997); Watson v. Caton, 984 F.2d 537, 539 (1<sup>st</sup> Cir. 1993). At the same time, a plaintiff’s pro se status does not excuse her from complying with procedural rules. See Instituto de Educacion Universal Corp. v. U.S. Department of Education, 209 F.3d 18, 24 n.4 (1<sup>st</sup> Cir. 2000). The Court construes Plaintiff’s Complaint liberally in deference to her pro se status.

### **B. Applicability of Fed. R. Civ. P. 12(b)(6)**

The defense that a plaintiff has failed to exhaust her administrative remedies is most appropriately considered under Federal Rule of Civil Procedure 12(b)(6). See Robinson v. Dalton, 107 F.3d 1018, 1022 (3<sup>rd</sup> Cir. 1997) (“Timeliness of exhaustion requirements are best resolved under Rule 12(b)(6) covering motions to dismiss for failure to state a claim.”); see also Martin K. Eby Construction Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 n.4 (5<sup>th</sup> Cir. 2004) (“Rule 12(b)(6) forms a

proper basis for dismissal for failure to exhaust administrative remedies."); Anjelino v. New York Times Co., 200 F.3d 73, 87 (3<sup>rd</sup> Cir. 2000) ("[T]he District Court should have considered the exhaustion and timeliness defenses presented in the case under Rule 12(b)(6), rather than under Rule 12(b)(1)."); Robinson v. Dalton, 107 F.3d at 1022 ("[T]he causes of action created by Title VII do not arise simply by virtue of the events of discrimination which that title prohibits. A complaint does not state a claim upon which relief may be granted unless it asserts the satisfaction of the precondition to suit specified by Title VII: prior submission of the claim to the EEOC [ ] for conciliation or resolution.") (quoting Hornsby v. U.S. Postal Serv., 787 F.2d 87, 89 (3<sup>rd</sup> Cir. 1986)) (second alteration in original); cf. Portela-Gonzalez v. Secretary of Navy, 109 F.3d 74, 77 (1<sup>st</sup> Cir. 1997) ("[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.") (quoting Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 58 S.Ct. 459 (1938)); Vinieratos v. U.S. Department of Air Force, 939 F.2d 762, 768 n.5 (9<sup>th</sup> Cir. 1991) (noting distinction between jurisdictional requirement and statutory prerequisite and treating exhaustion of administrative remedies as statutory prerequisite).

### C. Rule 12(b)(6) Standard

In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court must view the stated facts in the light most favorable to the pleader, In Re Credit Suisse First Boston Corp., 431 F.3d 36, 51 (1<sup>st</sup> Cir. 2005); see also Greater Providence MRI Ltd. Partnership v. Medical Imaging Network of S. New England, Inc., 32 F.Supp.2d 491, 493 (D.R.I. 1998), taking all well-pleaded allegations as true and giving the pleader the benefit of all reasonable inferences that fit the pleader's stated theory of liability, Redondo-Borges v. U.S. Department of Housing & Urban Development, 421 F.3d 1, 5 (1<sup>st</sup> Cir. 2005); see also Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 18 (1<sup>st</sup> Cir. 2002). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim for relief that is plausible on its face." Ashcroft v. Iqbal, \_\_ U.S. \_\_, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007)). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Id.; see also Bell Atlantic Corp., 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level ...."). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not require detailed factual allegations, Bell

Atlantic Corp., 550 U.S. at 555; see also Ashcroft, 129 S.Ct. at 1949, "a pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do,'" Ashcroft, 129 S.Ct. At 1949 (quoting Bell Atlantic Corp., 550 U.S. at 555). The fact that a motion to dismiss under Rule 12(b)(6) is unopposed does not relieve the district court of its obligation to examine the complaint to determine whether it is formally sufficient to state a claim. See Pomerleau v. W. Springfield Public Schools, 362 F.3d 143, 145 (1<sup>st</sup> Cir. 2004) (citing Vega-Encarnacion v. Babilonia, 344 F.3d 37, 41 (1<sup>st</sup> Cir. 2003)).

The Court, however, is not required to "credit bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." Aponte-Torres v. Univ. of Puerto Rico, 445 F.3d 50, 54 (1<sup>st</sup> Cir. 2006) (internal quotation marks omitted); see also Ashcroft, 129 S.Ct. at 1949 ("Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" (quoting Bell Atlantic Corp., 550 U.S. at 557) (alteration in original). Rule 12(b)(6) is forgiving, see Campagna v. Massachusetts Departmentt of Environmental Prot., 334 F.3d 150, 155 (1<sup>st</sup> Cir. 2003), but it "is not entirely a toothless tiger," Rivera v. Rhode Island, 402 F.3d 27, 33 (1<sup>st</sup> Cir. 2005) (quoting Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 67 (1<sup>st</sup> Cir. 2004) (quoting

Dartmouth Review v. Dartmouth College, 889 F.2d 13, 16 (1<sup>st</sup> Cir. 1989))). A plaintiff must allege facts in support of "each material element necessary to sustain recovery under some actionable legal theory." Campagna, 334 F.3d at 155.

### **III. Discussion**

Plaintiff alleges discrimination "in whole or in part, upon Plaintiff['s] age, color and/or race ...," Complaint ¶ 1, in violation of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"); the Federal Equal Pay Act ("FEPA"); Title VII of the Civil Rights Act of 1964, as amended ("Title VII"); and the Civil Rights Act of 1866, as amended ("section 1981" or "§ 1981"). Plaintiff additionally alleges retaliation, see id. ¶ 3, as well as harassment, intimidation, and verbal abuse in violation of the "R.I. Human Rights Act ...," id. ¶ 7. Plaintiff seeks a declaratory judgment that Defendant "violated Plaintiff['s] right to be free from discrimination in the workplace ...," Complaint at 3, injunctive relief, compensatory, exemplary, and/or punitive damages, back pay, front pay if applicable, and attorney's fees and costs, see id.

#### **A. ADEA**

"Under the ADEA, it is 'unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

because of such individual's age.'" Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141, 120 S.Ct. 2097 (2000) (quoting 29 U.S.C. § 623(a)(1)) (alteration in original); see also Rossiter v. Potter, 357 F.3d 26, 28 (1<sup>st</sup> Cir. 2004) ("Congress passed the ADEA with a view toward ending workplace discrimination based on age."); Lavery v. Marsh, 918 F.2d 1022, 1025 (1<sup>st</sup> Cir. 1990) ("[T]he ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace ....") (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756, 99 S.Ct. 2066 (1979)) (second alteration in original).

In one sense, the ADEA treats federal employees as a class apart from other employees. That difference implicates the ADEA's enforcement mechanism: whereas most employees must first exhaust administrative remedies before instituting an ADEA action, a federal employee has the option of bypassing administrative remedies entirely and suing directly in the federal district court.

Jorge v. Rumsfeld, 404 F.3d 556, 561 (1<sup>st</sup> Cir. 2005) (internal citations omitted); see also 29 U.S.C. § 633a(c);<sup>6</sup> Stevens v. Department of Treasury, 500 U.S. 1, 6, 111 S.Ct. 1562 (1991) ("A federal employee complaining of age discrimination ... does not have to seek relief from his employing agency or the EEOC at all. He can decide to present the merits of his claim to a federal

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<sup>6</sup> Section 633a deals exclusively with age discrimination in the federal government. See 29 U.S.C. § 633a. Section 633a(c) states that "[a]ny person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. § 633a(c).

court in the first instance."); Rossiter, 357 F.3d at 26 ("A federal employee ... who wishes to pursue an ADEA claim has a right, not available to other ADEA claimants, to bypass the administrative process and go directly to federal district court."). "A federal employee who wishes to avail himself of this bypass option must notify the EEOC of his intent to sue within 180 days following the occurrence of the allegedly unlawful practice and then observe a thirty-day waiting period before filing suit."<sup>7</sup> Jorge, 404 F.3d at 561; see also 29 U.S.C. § 633a(d).<sup>8</sup>

To establish a disparate treatment claim under the ADEA, "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." Gross v. FBL Financial Services, Inc., \_\_ U.S.\_\_, 129 S.Ct. 2343, 2350 (2009); see also id. at

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<sup>7</sup> It is not clear from the record whether Plaintiff complied with these requirements or not. The Court notes that Plaintiff did not check the box for age discrimination on her Complaint of Discrimination in the Federal Government ("DIILS Complaint"). See Braisted Decl., Ex. B (DIILS Complaint).

<sup>8</sup> Section 633a(d) provides that:

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

29 U.S.C. § 633a(d).

2351 ("A plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the 'but-for' cause of the challenged employer decision.") (citing Reeves, 530 U.S. at 141-43). Because, as with other kinds of employer discrimination cases, ADEA plaintiffs "rarely possess 'smoking gun' evidence to prove their employers' discriminatory motivations," Vélez v. Thermo King de Puerto Rico, Inc., 585 F.3d 441, 446 (1<sup>st</sup> Cir. 2009), plaintiffs who do not have such evidence "may nonetheless prove their cases by using the three stage burden-shifting framework set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)," Vélez, 585 F.3d at 446-47.<sup>9</sup> The initial burden to demonstrate a prima facie case of discrimination is Plaintiff's. See Dávila v. Corporación de Puerto Rico para la Difusión Pública, 498 F.3d 9, 15 (1<sup>st</sup> Cir. 2007). "The burden of

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<sup>9</sup> The Court of Appeals for the First Circuit observed in Vélez that:

In Gross, the Supreme Court noted that it "has not definitively decided whether the evidentiary framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), utilized in Title VII cases is appropriate in the ADEA context." Gross, 129 S.Ct. at 2349 n.2; see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (assuming arguendo that the McDonnell Douglas framework applies to an ADEA claim, and applying it to such a claim, "[b]ecause the parties do not dispute the issue."). This circuit, however, has long applied the McDonnell Douglas framework to ADEA cases.

Vélez v. Thermo King de Puerto Rico, Inc., 585 F.3d 441, 447 n.2 (1<sup>st</sup> Cir. 2009) (citing cases) (alteration in original).

making out a prima facie case is 'not onerous.'" Mesnick v. General Electric Co., 950 F.2d 816, 823 (1<sup>st</sup> Cir. 1991) (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089 (1981)).

[A] plaintiff establishes a *prima facie* claim of age discrimination by showing that: (1) he was at least 40 years old; (2) he met the employer's legitimate job performance expectations; (3) he experienced an adverse employment action; and (4) the employer had a continuing need for the services provided previously by the plaintiff.

Velázquez-Fernández v. NCE Foods, Inc., 476 F.3d 6, 11 (1<sup>st</sup> Cir. 2007); see also Mesnick, 950 F.2d at 823 (same).

Turning to Plaintiff's Complaint, she has not pled the first element of a prima facie case of age discrimination, namely that she is over forty years old. However, the Court will assume, for purposes of this Report and Recommendation, that Plaintiff meets this requirement as Defendant acknowledges that Plaintiff turned forty on December 3, 2007.<sup>10</sup> See Defendant's Mem. at 11.

Regarding the second element, Plaintiff states that she "performed her duties in a professional and outstanding manner." Complaint ¶ 2. Thus she has satisfied the requirement that she allege she met the employer's legitimate job performance expectations.

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<sup>10</sup> Defendant notes, however, that Plaintiff was a member of the protected class for only the final three weeks of her employment because she resigned from her position at DIILS on December 27, 2007. See Defendant's Mem. at 11.

As for the third element, although Plaintiff claims that she was subjected to “unlawful and discriminatory conduct and employment practices . . .,” id. ¶ 3, and a “campaign of harassment and intimidation . . .,” id. ¶ 7, she has not alleged that she suffered an adverse employment action, such as being denied a promotion, see Arroyo-Audifred v. Verizon Wireless, Inc., 527 F.3d 215, 219 (1<sup>st</sup> Cir. 2008), or actually or constructively discharged, see Vélez, 585 F.3d at 447; Dávila, 498 F.3d at 15, based on her age. Defendant argues that because “Plaintiff herself resigned,<sup>[11]</sup> she must show that she was constructively discharged.” Defendant’s Mem. at 10.

Constructive discharge can constitute an adverse employment action under the ADEA. Jorge, 404 F.3d 556, 561 (1<sup>st</sup> Cir. 2006); see also Torrech-Hernández v. General Electric Co., 519 F.3d 41, 50 (1<sup>st</sup> Cir. 2008) (“Adverse employment action, for purposes of the ADEA, includes actual or constructive discharge.”). In order to demonstrate that she was constructively discharged, Plaintiff must allege that “the working conditions imposed by the employer had become so onerous, abusive, or unpleasant that a reasonable person in the employee’s position would have felt compelled to resign.” Velázquez-Fernández, 476 F.3d at 12 (quoting Suárez v.

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<sup>11</sup> Plaintiff’s Complaint provides no information regarding her departure from DIILS. Defendant states that Plaintiff “resigned from her employment at DIILS on December 27, 2007.” Defendant’s Mem. at 10; see also id., Ex. D (Respon[se] to Show Cause Order) ¶ 2.

Pueblo International, Inc., 229 F.3d 49, 54 (1<sup>st</sup> Cir. 2000)); see also Torrech-Hernández, 519 F.3d at 50 ("In order to establish constructive discharge, [plaintiff] must show that conditions were so intolerable that they rendered a seemingly voluntary resignation a termination. In such cases, '[t]he question is not whether working conditions at the facility were difficult or unpleasant,' but rather, an employee 'must show that, at the time of his resignation, his employer did not allow him the opportunity to make a free choice regarding his employment relationship.'" (quoting Exum v. U.S. Olympic Committee, 389 F.3d 1130, 1135 (10<sup>th</sup> Cir. 2004)) (second alteration in original); id. ("Thus, in order for a resignation to constitute a constructive discharge, it effectively must be void of choice or free will.")).

In addition to her vague statements regarding unlawful and discriminatory conduct and employment practices and a campaign of harassment and intimidation, Plaintiff alleges that she

was subjected to different work instructions, extra work and denied sick leave and compensatory time of leave. [Plaintiff's] performance evaluation was changed after it was signed and she was held accountable for others' work that did not work within the same agency. [Plaintiff] was also subjected to different administrative procedural requirements and pay garnishment without explanation than her white co-workers.

Complaint ¶ 2. Elsewhere Plaintiff alleges that the Department of Defense conducted an investigation as "a direct request and consequence of allegations raised by Plaintiff ..., a black female employee, who reported that she had been subjected to

discrimination based on her race (African American), color (Black), reprisal (prior EEO complaint), harassment (nonsexual), verbal abuse, different pay and policy standards," id. ¶ 3, and refers to herself as "the only black employee that was employed by DIILS," id. ¶ 5. Nowhere in the Complaint does Plaintiff claim discrimination based on her age. Rather, her allegations appear to pertain to her race and color.

Moreover, Plaintiff has not alleged that she was forced to resign her position as a result of Defendant's allegedly discriminatory conduct and practices. Nor has she provided specific information or examples which would allow the Court to conclude that a reasonable person in Plaintiff's position would have felt compelled to resign. See Torrech-Hernández, 519 F.3d at 52 ("The standard for assessing a constructive discharge claim 'is an objective one: it cannot be triggered solely by the employee's subjective beliefs, no matter how sincerely held.'") (quoting Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 28 (1<sup>st</sup> Cir. 2002)); cf. id. at 53 ("[The plaintiff] presents no evidence suggestive of a plot by GE to rid itself of older employees or specifically to terminate [the plaintiff]. Rather, [the plaintiff]'s resignation was unforced ...."). Thus, she has not pled the third element of her prima facie case. See Velázquez-Fernández, 476 F.3d at 13 ("Because Velázquez has not shown actual or constructive discharge as a matter of law, he has

not made out a *prima facie* case under the ADEA ....").

With respect to the fourth element, Plaintiff's Complaint is silent as to whether DIILS had a continuing need for the services Plaintiff previously provided or whether a younger person was hired to perform those duties. Accordingly, she has not alleged the fourth element of her *prima facie* case.

Because the Court finds that Plaintiff has not pled the third and fourth elements of a *prima facie* case of age discrimination, Defendant's Motion should be granted as to Plaintiff's ADEA claim. I so recommend.

#### **B. FEPA**

FEPA provides that:

[N]o employer shall discriminate between employees "at a rate less than the rate at which he pays wages to employees of the opposite sex ... for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). To make out a *prima facie* [c]ase, a plaintiff must establish that "the employer paid different wages to an employee of the opposite sex for substantially equal work." Byrd v. Ronayne, 61 F.3d 1026, 1033 (1<sup>st</sup> Cir. 1995).

Maldonado-Cordero v. AT&T, 73 F.Supp.2d 177, 190 (D.P.R. 1999)

(first alteration in original). In order to make out a *prima facie* case, a plaintiff must show that: "(i) the employer pays different wages to employees of the opposite sex; (ii) the employees ... perform equal work on jobs requiring equal skill, effort, [and] responsibility; and (iii) the jobs are performed under similar working conditions." Id. (alteration in original).

The only allegation in Plaintiff's Complaint relating to differences in pay is that she "was subjected to ... pay garnishment without explanation than her white co-workers." Complaint ¶ 2. Thus, Plaintiff has not made out the first element of her prima facie case, that she was paid less than her male counterparts. She compares the garnishment of her pay to that of "her white co-workers," id., without noting whether these co-workers were male or female. The only other comparison she makes, not in the Complaint but in Plaintiff's Response, is to another female employee.<sup>12</sup> See Plaintiff's Response at 3.

The Court finds that Plaintiff has not pled a prima facie case under FEPA. Accordingly, Defendant's Motion to Dismiss should be granted as to this claim. I so recommend.

### **C. Title VII**

Title VII is a vehicle through which an individual may seek recovery for employment discrimination on the grounds of race, color, religion, gender, or national origin. Franceschi v. U.S. Department of Veterans Affairs, 514 F.3d 81, 85 (1<sup>st</sup> Cir. 2008). "Unlike the ADEA, Title VII does not spare federal employees from running the administrative gauntlet." Jorge, 404 F.3d at 564; see also Franceschi, 514 F.3d at 85 ("Before an employee may sue

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<sup>12</sup> In Plaintiff's Response, she states that "Plaintiff and another employee (Mrs. Odette Griffin) were classified under the federal system as GS/YB and considered equal employees in job descriptions. A review of the pay record will indicate that Plaintiff was the lowest paying employee with the DIILS agency." Plaintiff's Response at 3.

in federal court on a Title VII claim, he must first exhaust administrative remedies."); Jensen v. Frank, 912 F.2d 517, 520 (1<sup>st</sup> Cir. 1990) ("Title VII requires exhaustion of administrative remedies as a condition precedent to suit in federal district court."). The purpose of the exhaustion requirement is to provide the employer with prompt notice of the claim and to create an opportunity for early conciliation. Lattimore v. Polaroid Corp., 99 F.3d 456, 464 (1<sup>st</sup> Cir. 1996); see also Martinez v. Potter, 347 F.3d 1208, 1211 (10<sup>th</sup> Cir. 2003) ("requiring exhaustion of administrative remedies serves to put an employer on notice of a violation prior to the commencement of judicial proceedings").

The Title VII administrative process begins with the filing of an administrative charge before the EEOC. Franceschi, 514 F.3d at 85; see also Jorge, 404 F.3d at 564 ("An individual who has suffered discrimination at the hands of a federal employer on account of race, color, religion, gender, or national origin must file an administrative complaint with the EEOC within 180 days of the alleged unlawful employment practice."). The employee may sue in federal court only if the EEOC dismisses the administrative charge or if it does not bring a civil suit or enter into a conciliation agreement within 180 days of the filing of the administrative charge. Franceschi, 514 F.3d at 85; see also Jorge, 404 F.3d at 564 (describing process). In either

case, the EEOC must send the employee notice, in the form of what is known as a "right-to-sue letter." Franceschi, 514 F.3d at 85. "With limited exceptions ... the failure to exhaust this administrative process 'bars the courthouse door.'" Id. (quoting Bonilla v. Muebles J.J. Alvarez, Inc., 194 F.3d 275, 278 (1<sup>st</sup> Cir. 1999)); see also Jorge, 404 F.3d at 564 ("It is thus apparent that '[j]udicial recourse under Title VII ... is not a remedy of first resort.'" (quoting Morales-Vallellanes v. Potter, 339 F.3d 9, 18 (1<sup>st</sup> Cir. 2003)) (alterations in original); Roman-Martinez v. Runyon, 100 F.3d 213, 216-20 (1<sup>st</sup> Cir. 1996) (holding that a federal employee's failure to contact an EEOC counselor within the limitations period causes him to lose his right to pursue a later de novo action in court)).

"While private sector Title VII cases do not require a claimant to cooperate in the administrative process, the same is not true in cases involving federal employees. In fact, a complainant's failure to cooperate in the administrative process precludes exhaustion when it prevents the agency from making a determination on the merits." Austin v. Winter, 286 Fed. Appx. 31, 36 (4<sup>th</sup> Cir. 2008) (citing Jasch v. Potter, 302 F.3d 1092, 1094 (9<sup>th</sup> Cir. 2002)) (internal quotation marks omitted); see also Vinieratos, 939 F.2d at 772 ("[A]n administrative exhaustion rule is meaningless if claimants may impede and abandon the administrative process and yet still be heard in federal court.

... When a federal employee obstructs the smooth functioning of a properly elected administrative process and abandons that process to pursue a remedy elsewhere, he fails to exhaust his chosen remedy and thereby forecloses judicial review." ).

Defendant argues that Plaintiff's "failure to participate in the administrative process constitutes a failure to exhaust her administrative remedies ..., " Defendant's Mem. at 7; see also id. at 3, and that, as a result, her Title VII claim should be dismissed. See id. at 3, 7. Plaintiff asserts that she "pursued the administrative claim with diligence and in good faith. Plaintiff exhausted all administrative remedies." Plaintiff's Response at 3; see also id. ("The Plaintiff did not cut short or abandon the administrative process prior to the final disposition.") (internal citation omitted).

According to the Dismissal Order pertaining to Plaintiff's DIILS Complaint, the Administrative Judge on January 2, 2009, issued a scheduling order informing the parties that a telephonic prehearing conference would be held on February 6, 2009, and that witness lists were to be submitted no later than five days prior to the prehearing conference. See Defendant's Mem., Ex. A at 1; see also id., Ex. C at 2. Plaintiff "failed to submit a witness list and failed to contact the [Administrative Judge] to request an extension or offer an explanation for her actions." Defendant's Mem., Ex. A at 1; see also id., Ex. C at 2. Shortly

after 1:30 p.m. on February 6<sup>th</sup>, after being informed by the Agency representative that he had not heard from Plaintiff, the Administrative Judge attempted to contact Plaintiff at her last known telephone number, but it was not in service. See Defendant's Mem., Ex. A at 1; see also id., Ex. C at 2. Later that afternoon, at approximately 2:50 p.m., Plaintiff telephoned the Administrative Judge and asked if the pretrial conference was still being held. See Defendant's Mem., Ex. A at 1; see also id., Ex. C at 2. According to the Dismissal Order:

She offered no explanation for failing to notify the Agency or the Commission that her record telephone number was no longer in service. Nor did she explain why she ha[d] not contacted the Agency with respect to settlement as provided at Paragraph IV of the Acknowledgment Order, why she did not respond to the Agency when it attempted to contact her to discuss discovery[,] or why she did not submit a witness list as ordered in the scheduling order.

Defendant's Mem., Ex. A at 1; see also id., Ex. C at 2. On February 17, 2009, the Administrative Judge issued a Show Cause Order directing Plaintiff to show cause why sanctions, up to and including dismissal, should not be imposed for her conduct. See Defendant's Mem., Ex. A at 1-2; see also id., Ex. C. The Administrative Judge noted that in her Response to Show Cause Order Plaintiff did not deny that she failed to submit a witness list within five days prior to the prehearing conference; that she requested no extension of time to respond to orders or comply with deadlines prior to the issuance of the Show Cause Order; that she did not notify either the Administrative Judge or the

Agency that her telephone had been disconnected and ask to be contacted via e-mail or cell phone; that she failed to explain why certified mailings were not claimed when she received, at the same address, the Acknowledgment and Order and Order Scheduling Hearing; that she did not provide a copy of a letter she claimed to have sent to the Agency containing her e-mail and cell phone number; and that she did not provide any medical documentation of her psychiatric condition. See Defendant's Mem., Ex. A at 3-4. The Administrative Judge concluded that Plaintiff "ha[d] shown no good cause for failing to follow the orders of the Commission nor did she at any time from the issuance of the November 2008 Acknowledgment and Order forward a request [for] an extension o[f] time or stay of proceedings due to any medical condition." Id. at 4. Accordingly, the Administrative Judge dismissed Plaintiff's DIILS Complaint.

This Court finds that Plaintiff failed to exhaust her administrative remedies with regard to her Title VII claims due to her lack of cooperation with the administrative process, which led to the dismissal of her DIILS Complaint. See Austin, 286 Fed. Appx. at 37 ("Appellant's actions prevented the agency from fully investigating the complaint and reaching a final decision. Accordingly, this court finds that Appellant's failure to cooperate constitutes a failure to exhaust her administrative remedies."); Vinieratos, 939 F.2d at 773 ("Where, as here, the

complainant has only himself to blame for the absence of an administrative ruling of the merits of his claim, it is fair to conclude that he has failed to comply with the administrative exhaustion requirement. It is not the role of the federal judiciary to straighten out a mess that is the complainant's own doing."); Robinson v. Chao, 403 F.Supp.2d 24, 29 (D.D.C. 2005) ("Plaintiff had an obligation to respond to reasonable requests in the course of the agency's investigation of her discrimination claims. She did not fulfill that obligation, and, therefore, she did not exhaust her administrative remedies concerning those claims before filing them in this Court."); cf. Sellers v. U.S. Department of Defense, C.A. No. 07-418S, 2009 WL 559795, at \*12 (D.R.I. Mar. 4, 2009) ("Plaintiff did not respond to reasonable requests to clarify the scope and nature of her claim. Accordingly, [p]laintiff failed to exhaust her administrative remedies with respect to her hostile work environment claim."). Although Plaintiff attempted to explain—after the fact, see Braisted Decl., Ex. C; Plaintiff's Response at 2—the Court finds that she clearly failed to comply with the EEOC's procedures and the Administrative Judge's orders. Therefore, Defendant's Motion should be granted as to Plaintiff's Title VII claims. I so recommend.

#### **D. Section 1981**

In Brown v. General Services Administration, 425 U.S. 820,

96 S.Ct. 1961 (1976), the Supreme Court addressed the question of whether § 717 of the Civil Rights Act of 1964, as amended (the "Act"), 42 U.S.C. § 2000e-16, provides the exclusive judicial remedy for discrimination claims in federal employment. See id. at 821. There, the plaintiff had filed suit in federal district court, alleging jurisdiction based on, among other statutes, the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981.<sup>13</sup> See Brown, 425 U.S. at 823-24. Based on the intent of Congress in 1972 to create "an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination," id. at 829, and the structure of § 717 of the Act, see id., the Supreme Court concluded that § 717 "provides the exclusive judicial remedy for claims of discrimination in federal employment," id. at 835.<sup>14</sup>

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<sup>13</sup> Section 1981 provides in relevant part that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a). The statute defines "make and enforce contracts" as "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Id. § 1981(b).

<sup>14</sup> The Supreme Court additionally noted that "sovereign immunity would ... also bar claims against federal agencies for damages and promotion brought under the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981 ...." Brown v. General Services Administration, 425 U.S. 820, 827 n.8, 96 S.Ct. 1961 (1976).

Accordingly, the Court finds that Plaintiff's claim under § 1981 is barred and that Defendant's Motion to Dismiss should be granted as to this claim. I so recommend.

#### **E. Retaliation**

"Typically, 'in employment discrimination cases, "[t]he scope of the civil complaint is ... limited by the charge filed with the EEOC and the investigation which can reasonably be expected to grow out of that charge.'" Sellers, 2009 WL 559795, at \*8 (quoting Lattimore v. Polaroid Corp., 99 F.3d at 464 (quoting Powers v. Grinnell Corp., 915 F.2d 34, 38 (1<sup>st</sup> Cir. 1990))) (alterations in original); see also Fantini v. Salem State College, 557 F.3d 22, 27 (1<sup>st</sup> Cir. 2009) ("[T]he critical question is whether the claims set forth in the civil complaint come within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.") (internal quotation marks omitted); Maldonado-Cordero, 73 F.Supp.2d at 186 ("The only claims of discrimination cognizable before this Court are those that are 'like or reasonably related to the substance of charges timely brought before the EEOC.'"). However, "[a]n employee may bring to a court a claim of retaliation under Title VII without first presenting that claim to the agency if the retaliation is reasonably related to and grew out of the alleged discrimination that the employee did report, e.g., the retaliation is for filing the agency complaint

itself." Sellers, 2009 WL 559795, at \*13 (alteration in original) (internal quotation marks omitted); see also Clockedile v. New Hampshire Department of Corrections, 245 F.3d 1, 6 (1<sup>st</sup> Cir. 2001) ("[R]etaliation claims are preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency—e.g., the retaliation is for filing the agency complaint itself.").

In order to make out a prima facie case of retaliation, Plaintiff must show that: "(1) she engaged in protected conduct under Title VII; (2) she suffered an adverse employment action; and (3) the adverse action was causally connected to the protected activity." Fantini, 557 F.3d at 32.

An employee has engaged in activity protected by Title VII if she has either (1) opposed any practice made an unlawful employment practice by Title VII or (2) made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Title VII. ... The term protected activity refers to action taken to protest or oppose statutorily prohibited discrimination.

Id. (internal quotation marks omitted).

The only reference to retaliation in Plaintiff's Complaint is her statement that the May, 2007, Defense Department investigation "was a direct request and consequence of allegations raised by Plaintiff ..., a black female employee, who reported that she had been subjected to discrimination based on her race (African American), color (Black), reprisal (**prior** EEO complaint), harassment (nonsexual), verbal abuse, different pay

and policy standards.” Complaint ¶ 3 (bold added). As was the case in Sellers, however, Plaintiff appears to allege that the alleged retaliation occurred “in retaliation for having filed earlier charges, not in retaliation for bringing the charge on which this complaint is based.” 2009 WL 559795, at \*13 (internal citation omitted). Accordingly, the Court finds that Plaintiff has failed to exhaust her administrative remedies as to her retaliation claim. See id. (“Plaintiff cannot establish that the alleged retaliatory acts ... occurred after the filing of her 2006 EEO complaint which is the subject of this case.”); see also Mosely v. Potter, Docket No. 07-96-P-S, 2008 WL 877787, at \*7 (D. Me. Mar. 27, 2008) (noting Clockedile’s holding that “[a]n employee may bring to a court a claim of retaliation under Title VII without first presenting that claim to the agency if the retaliation claim is reasonably related to and grew out of the alleged discrimination that the employee did report-‘e.g., the retaliation is for filing the agency complaint itself.’”) (quoting Clockedile, 245 F.3d at 6).

Even if Plaintiff is arguing retaliation based on filing the DIILS Complaint, Plaintiff has failed to make out a prima facie case of retaliation. Reading her Complaint liberally, the Court assumes that she engaged in protected activity. See Complaint ¶ 3; see also Fantini, 557 F.3d at 32. However, there is nothing in the Complaint which would allow the Court to conclude that her

departure from DIILS was anything other than voluntary. Accordingly, she has not shown that she suffered an adverse employment action in the form of constructive discharge.

Moreover, Plaintiff provides no details regarding the "prior EEO complaint," what discrimination complained of constituted retaliation, a link between the prior complaint and the discrimination, and who perpetrated the alleged retaliation. While the First Circuit has held that a "hostile work environment, tolerated by the employer, is cognizable as a retaliatory adverse employment action . . .," Noviello v. City of Boston, 398 F.3d 76, 89 (1<sup>st</sup> Cir. 2005); see also id.

("[W]orkplace harassment, if sufficiently severe or pervasive, may in and of itself constitute an adverse employment action sufficient to satisfy the second prong of the prima facie case for Title VII retaliation cases."), Plaintiff has not shown that the retaliation was "causally connected to the protected activity," Fantini, 557 F.3d at 32; see also Douglas v. J.C. Penney Co., 474 F.3d 10, 15 (1<sup>st</sup> Cir. 2007) ("To establish a claim of unfair retaliation, a plaintiff needs to prove that protected conduct and an adverse employment action are causally linked."); cf. Lattimore, 99 F.3d at 464 ("Even a *pro se* complainant is required to describe the essential nature of the claim and to identify the core facts on which it rests."). Therefore, she has failed to establish a prima facie case of retaliation. See

Clockedile, 275 F.3d at 7 ("little direct evidence links specific actions with an explicit retaliatory motive").

Thus, the Court finds that Plaintiff has not exhausted her administrative remedies with regard to her retaliation claim. The Court further finds that, even if she had exhausted her administrative remedies, she has not made out a prima facie case of retaliation. Therefore, Defendant's Motion to Dismiss should be granted as to Plaintiff's retaliation claim. I so recommend.

#### **F. State law claim(s)**

Plaintiff alleges that her rights under the "R.I. Human Rights Act," Complaint ¶ 7, were violated. It is unclear to which statute Plaintiff intended to refer. Defendant "assumes," Defendant's Mem. at 7, that Plaintiff meant to cite to the Rhode Island Fair Employment Practices Act ("RIFEPA"), R.I. Gen. Laws § 28-5-7 et seq. (2003 Reenactment). Alternatively, Plaintiff may have intended to refer to the Rhode Island Civil Rights Act ("RICRA"), R.I. Gen. Laws § 42-112-1 et seq. (2006 Reenactment). In either case, because the Court has recommended that all of Plaintiff's federal claims be dismissed, the Court further recommends that it decline to exercise supplemental jurisdiction over Plaintiff's state law claim(s). See Rossi v. Gemma, 489 F.3d 26, 39 (1<sup>st</sup> Cir. 2007) ("At the time the district court made its ruling, it had dismissed all federal claims on the pleadings, and so dismissal of the state claims was perfectly reasonable.

'As a general principle, the unfavorable disposition of a plaintiff's federal claims at the early stages of a suit ... will trigger the dismissal without prejudice of any supplemental state-law claims.'") (quoting Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168, 1177 (1<sup>st</sup> Cir. 1995)) (alteration in original); see also Maldonado-Cordero, 73 F.Supp.2d at 187 ("In light of the fact that the Court has dismissed Plaintiffs' federal sexual harassment claims, the Court declines to exercise its supplemental jurisdiction over the sexual harassment claims under Puerto Rico Laws ...."); DM Research, Inc. v. College of American Pathologists, 2 F.Supp.2d 226, 230 (D.R.I. 1998) ("Having determined that the sole federal claim should be dismissed, the Court has discretion to determine whether it should exercise supplemental jurisdiction over those claims.") (citing 28 U.S.C. § 1367(c)(3)); id. ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.") (quoting United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130 (1966)).

### **G. Summary**

The Court finds that Plaintiff's ADEA, FEPA, and retaliation claims should be dismissed because she has not made out a prima facie case as to these claims. In addition, with respect to her retaliation claim, it appears that Plaintiff is claiming

retaliation based on her filing of a prior EEOC complaint, not the current EEOC complaint on which the instant action is based. The Court further finds that Plaintiff's Title VII claim should be dismissed because she has failed to exhaust her administrative remedies. Her § 1981 claim should be dismissed because Title VII is the exclusive remedy for discrimination in federal employment. Finally, the Court should decline to exercise supplemental jurisdiction over Plaintiff's state law claim(s) if her federal claims are dismissed. Accordingly, Defendant's Motion to Dismiss should be granted as to all counts of Plaintiff's Complaint. I so recommend.

#### **IV. Conclusion**

For the reasons explained above, the Court recommends that Defendant's Motion to Dismiss be granted. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within fourteen (14) days of its receipt. See Fed. R. Civ. P. 72(b); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1<sup>st</sup> Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1<sup>st</sup> Cir. 1980).

/s/ David L. Martin  
DAVID L. MARTIN  
United States Magistrate Judge  
July 2, 2010